Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1311

SHELL OIL COMPANY, SHELL PIPELINE CORPORATION, AMOCO OIL COMPANY and STANDARD OIL COMPANY (INDIANA),

Petitioners,

v.

FRED WEBER, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT

Fred Weber, Inc. in Opposition

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Rules Involved	2
Statement of the Case	3
A. Preliminary Statement	3
B. Proceedings Below	5
Reasons for Denying the Writ	12
A. There Is No Conflict With the Decisions of the United States Court of Appeals for the Second Circuit	12
B. The Trial Court Correctly Found That No Member of the Lashly Firm Received Any Confidential Information From Any of the Other Defendants in United States v. American Oil Co., et al. This Finding of Fact Is Not Clearly Erroneous	18
C. Petitioners' Circular Argument Concerning Claimed Confidences	20
D. Petitioners' Unfounded Innuendos	20
Conclusion	20

Statutes and Authorities

Cases

Abraham Construction Corp. v. Armco Steel Corp., 559 F.2d 250 (5th Cir. 1977) 14, 15

Akerly v. Red Barn System, Inc., 551 F.2d 539 (3d Cir. 1977) 19

Allied Realty of St. Paul, Inc. v. Exchange National Bank of Chicago, 408 F.2d 1099 (8th Cir. 1969) 19
American Can Company v. Citrus Feed Co., 436 F.2d 1125 (5th Cir. 1971) 12, 13, 21

Chugach Electric Association v. United States District Court for the District of Alaska, 370 F.2d 441 (9th Cir. 1966), cert. denied 389 U.S. 820 (1967) 12
Consolidated Theatres, Inc. v. Warner Bros. Circuit Management Corp., 216 F.2d 920 (2d Cir. 1954) 12, 13
Continental Oil Co. v. United States, 330 F.2d 347 (9th Cir. 1964) 20

Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973) 12

Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225 (2d Cir. 1977) 14, 15, 16, 18

Gas-A-Tron of Arizona v. Union Oil Company of California, et al., 534 F.2d 1322, 1325 (9th Cir. 1976) ..12, 13
Grand Jury Subpoena Duces Tecum, 406 F.Supp. 381 (S.D.N.Y. 1975) 20

Hull v. Celanese Corp., 513 F.2d 568 (2d Cir. 1975) 14, 15, 16, 18, 19
Hunydee v. United States, 355 F.2d 183 (9th Cir. 1965) .. 20

Laskey Bros. of West Virginia, Inc. v. Warner Bros. Pictures, Inc., et al., 224 F.2d 824 (2d Cir. 1955) 12, 13, 16, 17, 18

NCK Organization Ltd. v. Bregman, 542 F.2d 128 (2d Cir. 1976) 14, 15, 16, 18

Schloetter v. Railoc of Indiana, Inc., 546 F.2d 706 (7th Cir. 1976) 13
Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751 (2d Cir. 1975) 13, 17, 18

United States v. American Oil Co. et al., 65 CR 150(3) (1965) 3-4, 5, 8, 9, 14, 18, 22
United States v. United States Gypsum Company, 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948) 19

W. E. Bassett Co. v. H. C. Cook Co., 201 F.Supp. 821 (D. Conn. 1962) 13, 16
Woods v. Covington County Bank, 537 F.2d 804 (5th Cir. 1976) 17

Statutes and Rules

American Bar Association's Code of Professional Responsibility:
Canon 4 .....2, 12
Canon 5 2
Canon 9 .....2, 17
"Representation of Interest Adverse to That of a Former Client," 55 Boston University Law Review 61 (1975) ..21-22

Rule 52(a), F.R.C.P. 19

28 U.S.C. § 1254(1) 2

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BRIEF FOR RESPONDENT
Fred Weber, Inc. in Opposition

Respondent Fred Weber, Inc. respectfully prays that the writ of certiorari sought by petitioners be denied.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Eighth Circuit, 566 F.2d 602 (8th Cir. 1977) and the United States District Court for the Eastern District of Missouri, 432 F.Supp. 694 (E.D. Mo. 1977) are correctly cited and reproduced in petitioners' Appendix.

JURISDICTION

Petitioners correctly invoke 28 U.S.C. 1254(1), and the petition for certiorari is timely filed.

QUESTIONS PRESENTED

I. Does a lawyer's representation of A, co-defendant with B in a prior suit, disqualify the lawyer as representative of C against B in a subsequent related suit?

II. Does a lawyer's representation of A, co-defendant with B in a prior suit, disqualify the lawyer as a representative of C against B in a subsequent related suit, where there is no evidence that he in fact received any confidential communication from B or B's lawyer in the prior suit and where there is direct evidence and a finding of fact that he did not receive any such confidential communication?

III. In the situation described in question II is the District Court's finding that no confidential communication was received by A's lawyer or the District Court's denial of a motion to disqualify to be disturbed on an interlocutory appeal as "clearly erroneous" or as "an abuse of discretion?"

RULES INVOLVED

Petitioners rely on Canons 4 and 9 of the American Bar Association's Code of Professional Responsibility. Petitioners have correctly abandoned their claims under Canon 5.* [Pet. Append., pp. 3(a) and 10(a)].

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* Canon 4 provides:

"A lawyer should preserve the confidences and secrets of a *client*." (emphasis supplied)

Canon 5 provides:

"A lawyer should exercise independent judgment on behalf of a *client*." (emphasis supplied)

Canon 9 provides:

"A lawyer should avoid even the appearance of professional impropriety."

STATEMENT OF THE CASE

A. Preliminary Statement

This is an appeal by Shell Oil Company and Shell Pipe Line Company (hereinafter "Shell") and Standard Oil Company (Indiana) and Amoco Oil Company (hereinafter "Standard"),[1] from the Order of the United States District Court for the Eastern District of Missouri, The Honorable John F. Nangle, denying their motion to disqualify Lashly, Caruthers, Thies, Rava & Hamel (hereinafter the "Lashly firm"), a St. Louis law firm, as attorneys for plaintiff-respondent, Fred Weber, Inc. The United States Court of Appeals for the Eighth Circuit affirmed and Shell and Standard petitioned this Court for a writ of certiorari.

Suit was filed by Fred Weber, Inc. December 8, 1975. The issues on the merits are framed by the Amended Complaint filed May 3, 1976 which contains allegations that the defendant oil companies conspired and monopolized concerning the price of penetration grade asphalt oil, the essential petroleum ingredient in hot asphalt mix. Large parallel price increases, including price increases from $25 per ton to $65 per ton during the period 1974, 1975 and 1976, are alleged. Violations of the Robinson-Patman Act, unconscionable pricing and fraud are also charged.

Shell and Standard[2] contend that the Lashly firm should be disqualified because of claimed receipt of confidential communications allegedly arising out of the Lashly firm's earlier representations of co-defendants of Shell and Amoco in *United*

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[1] Shell Pipe Line Company is a wholly owned subsidiary of Shell Oil Company. Amoco Oil Company is a wholly owned subsidiary of Standard Oil Company (Indiana).

[2] The motion to disqualify the Lashly firm was filed in the District Court by Shell Oil Company and Amoco Oil Company, which was formerly named American Oil Company.

States v. American Oil Co. et al., 65 CR 150(3) (1965) thirteen years ago. *Nolo contendere* pleas were entered in that case by all 33 defendants in 1965 on an indictment for price fixing and division of territories with respect to sales of asphalt cutbacks to the State of Missouri. Members of the Lashly firm represented several defendants, but not Shell or Amoco (then American Oil Company).

The thrust of Shell's and Standard's claim is that John H. Lashly and Paul B. Rava of the Lashly firm served on defense committees in the earlier criminal case and had "access" to certain undescribed information from co-defendants in the 1965 case which is alleged to have been confidential; and that the entire Lashly firm should therefore be disqualified.

There is an irrebuttable presumption that a lawyer who has had "access" to confidences from his former client has received such confidences. The District Court denied the motion to disqualify and the Court of Appeals affirmed on the ground that the presumption of confidential communication which arises from a former attorney-client relationship does not apply as between counsel for co-defendants in a prior case; that since no member of the Lashly firm had ever represented Shell or Amoco there is no presumption of confidential communication; and that there was in fact no confidential communication received by any member of the Lashly firm. No evidence of any such confidential communication was introduced. Mr. Lashly and Mr. Rava of the Lashly firm denied receiving any such communications.

The Court of Appeals correctly characterized the case as "one of first impression." There is no conflict with the decisions of any circuit. The case was decided both in the District Court and in the Eighth Circuit upon settled principles of law which have governed motions to disqualify for decades.

B. **Proceedings Below**

On January 10, 1977, the motion to disqualify the Lashly firm was filed by defendants Shell Oil Company and Amoco Oil Company. They filed supplemental submissions February 25, 1977, March 14, 1977 and March 25, 1977. The motion describes no confidences secured by any member of the Lashly firm. The supplemental submissions describe no such confidence.

On April 20, 1977, the trial judge ordered counsel for Shell and Amoco to file *in camera* any and all material in their possession supporting the allegations made in their motion to disqualify. In addition, he ordered affidavits to be filed by both parties, which were to set out "all confidences" exchanged during the pendency of the earlier criminal case in 1965. Shell and Amoco resisted these orders. Their request for vacation of the orders was denied May 5, 1977.

Evidently a number of documents were filed by Shell and Amoco *in camera*. These documents have never been viewed by counsel for Fred Weber, Inc.

The motion to disqualify was heard on June 1 and June 3, 1977. Evidence was adduced, and exhibits were submitted (Tr. 1, 80).

Th evidence was that an indictment was returned in *United States v. American Oil Co. et al.*, No. 65 CR 150 (3) on July 22, 1965, against 16 corporate defendants and 17 connected individuals (Tr. 82). It was the result of a grand jury investigation commenced in the fall of 1964 (Tr. 96). Shell and Amoco (then American Oil Co.) were defendants. No present or former member of the Lashly firm represented Shell or Amoco in that proceeding (Tr. 125, 126, 127). This is conceded by Shell and Amoco on pages 14 and 33 (n.36) of their brief before the Eighth Circuit. No present or former member of the Lashly firm has ever represented Shell or Amoco in any matter at any time (Tr. 126, 127).

The indictment in the 1965 case charged that "beginning sometime in 1960 and continuing thereafter through at least 1963 * * *" defendants engaged in a conspiracy to suppress and eliminate competition in the sale of "cut-back asphalt" in and to the State of Missouri. It further charged that the defendants, among other things:

> "(c) Discussed and distributed among themselves what was sometimes referred to by the defendants and co-conspirators, as the 'scoresheet' or 'bible', which contained agreed-upon prices applicable to each of the 114 Missouri counties; and
>
> "(d) Discussed and agreed that each defendant and co-conspirator bidder would bid below the agreed-upon prices as shown on the 'score sheet' or 'bible' for sales on which it was to be the low bidder and bid at or above such prices for sales on which it was not to be the low bidder." (Indictment, para. 15)

At the hearing before Judge Nangle, petitioners presented one witness, Mr. Richmond C. Coburn, who at the time of the criminal trial represented Amoco and who also represents Amoco in the instant case. Witnesses called by plaintiff were Hon. William H. Webster (then Judge of the Court of Appeals of the Eighth Circuit and now Director of the Federal Bureau of Investigation), Mr. Robert Allen, partner in the firm of Lewis, Rice, Tucker, Allen & Chubb, Mr. John H. Lashly, and Mr. Paul B. Rava, partners in the Lashly firm.

In 1965, Mr. Allen represented Missouri Petroleum Company, a corporate defendant and Judge Webster represented Mobil Oil Corporation, also a corporate defendant. Messrs. Lashly and Rava represented Kerr-McGee Oil Company, Riffe Petroleum Company and other individual defendants connected with them and with Missouri Petroleum Company.

Not until August 16, 1965, approximately one month after the indictment was issued were any defense committees formed (Tr. 14, 15).

Mr. Rava was named a member of the Committee on Documents on August 17, 1965, by Mr. Coburn (Tr. 90, 91). No documents were collected (Tr. 90, 91). The District Court so found. 432 F.Supp. 694, 696.

Meetings alleged to have taken place (Pet. for Writ of Cert., p. 5) were the subject of testimony by both Mr. Allen and Judge Webster.

Mr. Allen stated:

> "* * * I don't recall attending any meeting of counsel before the indictment. But I remember that there was this matter of lawyers, there must have been 50 in the room, and perhaps I'm—from my experience, I'm a skeptic about meetings of lawyers, particularly when they are that large, they seldom, if ever, accomplish anything, and don't recall certainly anything that I considered of a confidential nature being disclosed at one or more meetings that I attended." (Tr. 43)
>
> "* * * No, and I didn't look at anyone else's, nor did I look at any documents, nor did I supply any documents. At these meetings that I attended of meetings of counsel at the Jefferson Hotel, I recall, you know, various lawyers getting up and saying, 'shouldn't we file a motion for a bill of particulars?' and others would say 'no, I don't think that's a good idea', and somebody else would talk about the implications of a nolo plea and the law and the effect of a nolo plea, and in connection with subsequent civil antitrust litigation, there were other—there were other things discussed." (Tr. 45)

Judge Webster's testimony as to the alleged meetings and discussions among counsel was similar (Tr. 53).

Communications among counsel in the *American Oil Co.* case were not confidential. The situation is best described by Judge Webster's testimony:

> "* * * Now, this case was a little different that (sic) some other cases in that the major oil companies had made their peace or were in the process of making their peace with the State of Missouri and the State Highway Department, and a lot of this information was out in the open, in the process of doing this, and so we very early on reached a conclusion that a nolo plea would be in the best interest of our clients, and I don't know that we were proceeding in an investigatory way quite the same way that we might have been." (Tr. 64)

Mr. Allen did not discuss the case with Mr. Coburn; he did not look at debriefing memos; and he did not look at documents (Tr. 77).

Judge Webster testified:

> "Q. (by Ms. Weems) You did not receive any confidential information about any other defendants, is that what you are saying?
>
> A. That's what I'm saying." (Tr. 52)

What happened with respect to the criminal case of *United States v. American Oil Co., et al.* is obvious. The indictment was returned July 22, 1965 (Tr. 82). Less than a month thereafter, a meeting of as many defense counsel as possible was held at the Jefferson Hotel (Tr. 85, 121; Supplemental Submission of Shell and Amoco, February 25, 1977—Memo of John H. Morrison, counsel for American Oil Company). Committees were formed but did little (Memo of John H. Morrison).

The thrust of the discussions between attorneys, after a degree of cooperation was agreed upon, was with respect to the possibility of entering *nolo* pleas and having them accepted by

the District Court (Tr. 88, 122). As stated by Judge Webster, "It was pretty obvious that the Government had a very complete case against the oil companies, and that there was little or no real defense that could be offered * * *" (Tr. 66).

The arraignment was September 8, 1965 (Tr. 92, 108). With no intervening motions, the defendants filed a joint application for change of plea on October 6, 1965 (Tr. 108). On November 19, 1965, pleas of *nolo contendere* were entered and punishment was imposed (Tr. 108). No witness even mentioned preparation for trial in that short period of time.

The Lashly firm was first employed to represent Mr. Edward Gomes, president of Missouri Petroleum Company in 1964 (Tr. 82). Mr. Allen represented the corporation (Tr. 42, 83).

Representation of Homer Riffe, an individual defendant, was undertaken by the Lashly firm after the indictment in July 1965 (Tr. 96). Representation of Kerr-McGee Oil Company and Mr. Jack Mitchell, an employee thereof, began around the first part of September 1965 (Tr. 118). Mr. C. Kenneth Thies represented defendant Phillips Petroleum Company in *United States v. American Oil Co., et al.* Mr. Thies joined the Lashly firm January 1, 1973 and died in July 1974, a year and a half before Mr. Weakley joined the firm. Mr. Rexford Caruthers was employed to represent Patricia Lorenz late in the proceedings and entered his appearance shortly before the sentencing. He did not have sufficient connection with the case for his name to appear on the District Court's Docket Sheet. He attended the sentencing. He joined the Lashly firm January 1, 1968. Plaintiff's counsel disclosed Caruther's representation of Patricia Lorenz in a footnote in the Memorandum in Opposition to the Motion to Disqualify (February 28, 1977).

Mr. Rava testified that his activity prior to the indictment consisted of jointly gathering documents with Mr. Allen on

behalf of Missouri Petroleum Company and its president, Gomes, in answer to a grand jury subpoena (Tr. 83, 84).

During this entire period, the only debriefing statement of any witness seen by Mr. Rava was that of an employee of the corporate client which he prepared with Mr. Allen (Tr. 90). A copy of this statement was not supplied to Mr. Coburn's office by Mr. Rava (Tr. 101). He never went to Mr. Coburn's office to examine any papers (Tr. 91). The only conversations Mr. Rava had with other lawyers in the case prior to the indictment consisted of general discussions with his friends in attempting to find out "something about the scope of what was going on". (Tr. 99, 100, 101).

The only joint documents prepared were the application for a change of plea (Tr. 89) and a supporting brief (Tr. 90). All other representation was on an individual basis (Tr. 90).

Mr. Lashly testified that he attended the first meeting of counsel for all defendants on August 16, 1965 (Tr. 121) and that thereafter—sometime in the first ten days of September, 1965—he entered his appearance for defendants Kerr-McGee Oil Company and its employee, Jack Mitchell (Tr. 121). After pleas of not guilty were entered on September 8, 1965 (Tr. 108), Mr. Lashly attended another meeting of all counsel for all defendants (Tr. 122). At that meeting and from that time on, telephone conferences and correspondence with the Lashly firm clients and with other lawyers, were with reference to whether a *nolo contendere* plea was appropriate, whether the court might accept it, and whether it was in the best interest of the client to enter such a plea (Tr. 122-123).

With reference to debriefing statements supposedly deposited in Mr. Coburn's office, Mr. Lashly stated that not only did he not examine same, but that he was not aware that such a file existed (Tr. 122). The reference to review of debriefing state-

ments contained on the Lashly bill to Kerr-McGee (Shell Ex. A, Pet. Append. 23a, 24a, Tr. 123) pertains to the debriefing statements of employees of Kerr-McGee, including Mr. Mitchell (Tr. 123). Mr. Lashly never saw any other debriefing statements (Tr. 123). No confidential communications were transmitted to Mr. Lashly nor any other member of the Lashly firm, by any employee, witness for, or counsel for Shell or Amoco (Tr. 126).

REASONS FOR DENYING THE WRIT

A. There Is No Conflict With the Decisions of the United States Court of Appeals for the Second Circuit.

Attempts to disqualify a lawyer because of his participation in a prior case are usually bottomed upon Canon 4 which provides that "a lawyer should preserve the confidences and secrets of a *client*." (emphasis supplied)

Clearly the reference is to the lawyer's own client. The rationale of disqualification is that a lawyer should not be permitted to utilize information received in confidence from a client against that client in a later related case.

Where a lawyer brings suit against his own former client no inquiry is made into whether or not there was in fact a confidential communication between them. *Consolidated Theatres, Inc. v. Warner Bros. Circuit Management Corp.*, 216 F.2d 920 (2d Cir. 1954); *Emle Industries, Inc. v. Patentex, Inc.*, 478 F.2d 562 (2d Cir. 1973); *Chugach Electric Association v. United States District Court for the District of Alaska*, 370 F.2d 441 (9th Cir. 1966), *cert. denied* 389 U.S. 820 (1967). It is sometimes said that confidential communication is conclusively presumed or inferred as between the lawyer and his former client. *Laskey Bros. of West Virginia, Inc. v. Warner Bros. Pictures, Inc., et al.*, 224 F.2d 824 (2d Cir. 1955); *American Can Company v. Citrus Feed Co.*, 436 F.2d 1125 (5th Cir. 1971). *See also Gas-A-Tron of Arizona v. Union Oil Company of California, et al.*, 534 F.2d 1322, 1325 (9th Cir. 1976), where the United States Court of Appeals for the Ninth Circuit expressly refused to infer knowledge of the confidences of the former client as it did in *Chugach Electric Association v. United States District Court for the District of Alaska*, supra. It is established that if a lawyer is disqualified because of conflict of interest with a former client, his entire firm is disqualified. *Consolidated Theatres, Inc. v. Warner Bros. Circuit Management Corp.*, supra; *American Can Company v. Citrus Feed Co.*, supra; *W. E. Bassett Co. v. H. C. Cook Co.*, 201 F.Supp. 821 (D. Conn. 1962). Again no inquiry is made into whether or not the lawyer has in fact communicated to his partners his former client's confidences. That communication is presumed. *Laskey Bros. of West Virginia, Inc. v. Warner Bros. Pictures, Inc.*, supra; *American Can Company v. Citrus Feed Co.*, supra; *Schloetter v. Railoc of Indiana, Inc.*, 546 F.2d 706 (7th Cir. 1976). As to association with a former firm, the presumption, inference or imputation is said to be rebuttable. *Laskey Bros. of West Virginia, Inc. v. Warner Bros. Pictures, Inc.*, supra; *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751 (2d Cir. 1975); *Gas-A-Tron of Arizona v. Union Oil Company of California, et al.*, supra.

It is important to see that these principles arise from the prior attorney-client relationship. Necessarily a client communicates confidential information to his lawyer. Such communication is fundamental to the attorney-client relationship. Necessarily a lawyer's partners are privy to information received from a client. That is the nature of a law partnership. But separate counsel for separate co-defendants, especially in a criminal case, do not necessarily communicate. There is nothing in their relationship to their respective clients or in their relationship to each other which requires communication of confidential information. There is no basis, without proof, for inferring or presuming that counsel for one co-defendant has in fact communicated a client's confidence to counsel for another, or for inferring or imputing knowledge of such a confidence from one to the other.

The decisions of the District Court and the United States Court of Appeals for the Eighth Circuit herein were predicated upon a recognition of these fundamental principles.

Both the Eighth Circuit in the instant case and the Fifth Circuit in *Abraham Construction Corp. v. Armco Steel Corp.*, 559 F.2d 250 (5th Cir. 1977) (decided September 14, 1977, the day the instant case was argued in the Eighth Circuit) have held that there is no presumption of confidential communication among counsel for co-defendants. In the instant case the Eighth Circuit affirmed the District Court's denial of a motion to disqualify after a full evidentiary hearing and a finding of fact, supported by substantial evidence, that there was no communication of client confidences from counsel for co-defendants to members of the Lashly firm in the earlier case, *United States v. American Oil Co., et al.* In the *Abraham Construction Corp.* case the Fifth Circuit reversed the denial of a motion to disqualify for failure to hold an evidentiary hearing on the issue of what, if any, client's confidences had been communicated among counsel for co-defendants. Both the Eighth Circuit herein and Fifth Circuit in *Abraham Construction Corp.* hold that in the absence of proof of receipt of a confidence by counsel for a co-defendant in an earlier case, disqualification is to be denied. These are the only two decisions which deal with this issue. Both decisions rest squarely on well established principles which have their genesis in the attorney-client relationship. Neither decision is in any way inconsistent with the Second Circuit's position.

The three Second Circuit cases relied on by petitioners, *Hull v. Celanese Corp.*, 513 F.2d 568 (2d Cir. 1975); *NCK Organization Ltd. v. Bregman*, 542 F.2d 128 (2d Cir. 1976); *Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225 (2d Cir. 1977) are concerned with the relationship between two lawyers for the *same client*, not with the relationship between separate lawyers for different clients who are co-defendants.

The issue of whether the *Hull* case or the *NCK* case is applicable was argued to the Eighth Circuit in the instant case. The Eighth Circuit has ruled herein:

> "Absent an attorney-client relationship, no court has applied the presumption inherent in Canon 4. Shell and Amoco's reliance on *NCK Organization Ltd. v. Bregman*, 542 F.2d 128 (2nd Cir. 1976), and *Hull, supra*, for the proposition that an attorney-client relationship is not required for application of Canon 4, is unavailing. In those cases, in-house counsel for the corporate defendants switched sides; in the former by becoming co-counsel of plaintiff's attorney; in the latter by becoming a plaintiff in the suit and retaining the original plaintiff's attorneys. In-house counsel in both cases were presumed to have received information from their former corporate clients, and that information was imputed to the attorneys with whom in-house counsel became associated." (566 F.2d 602, 608)

And further

> "Of itself, representation of a codefendant of B raises no presumption that the lawyer obtained confidential information detrimental to B's interests. Nor may confidential information which B may have imparted to its counsel be imputed to the lawyer. The relationship between individual counsel for separate codefendants differs in structure and function from the relationship between partners in a law firm and from the relationship between co-counsel for a single party." (566 F.2d 602, 609)

The *Fund of Funds* case decided in November 1977 nearly two months after the Eighth Circuit's decision in the instant case, is but another example of the imputation of a former client's confidences between two co-counsel for the same client.

The *Hull* case, the *NCK* case, and the *Fund of Funds* case are not in conflict with the Eighth Circuit's decision in the instant case, or with the Fifth Circuit's decision in the *Abraham Construction Corp.* case because they do not involve the relationship of counsel for co-defendants and are in no way

predicated upon any attempt to infer or presume a communication of confidences among counsel for co-defendants. Each case turns upon the presumption that a lawyer had received confidences from his own client; Delulio from Celanese in the *Hull* case, Randall from ORG in the *NCK* case, and Morgan Lewis from Arthur Andersen in the *Fund of Funds* case. In each case the presumed confidence was imputed between co-counsel for the client's opponent; in the *Hull* case from Delulio to the Rabinowitz firm; both of whom in effect came to represent Hull; in the *NCK* case, from Randall to the Weil firm, both of whom came to represent Bregman; and in the *Fund of Funds* case, from the Morgan Lewis firm to Meister, both of whom came to represent Fund of Funds. The only unique feature of these cases is the so-called "triangular relationship" referred to by the Second Circuit, i.e., the relationship among two co-counsel and the client whom they both represent. The Second Circuit's ruling which imputes confidential information obtained from another client as between two co-counsel for the same client is not unlike the well established ruling that confidential information presumed to be received by one partner in a law firm will be imputed to all of his partners. (*Laskey Bros. of West Virginia, Inc. v. Warner Bros. Pictures, Inc.*, supra; *W. E. Bassett Co. v. H. C. Cook Co.*, supra.) Two lawyers working for a client on the same matter necessarily exchange the information which they have as do law partners. That is not the case with separate counsel for co-defendants. As indicated, the relationship between counsel for co-defendants is not a confidential one, and there is nothing in the relationship itself which requires any communication of client's confidences.

It is important to note that in the *Hull* case, the *NCK* case, and the *Fund of Funds* case counsel actually switched from representing one party in a case to representing the other party in the same case. In the instant case no member of the Lashly firm representing Fred Weber, Inc. ever represented Shell or Amoco.

With respect to the applicability of Canon 9, the Eighth Circuit's quotation from *Woods v. Covington County Bank*, 537 F.2d 804 (5th Cir. 1976) is apposite.

> "It does not follow, however, that an attorney's conduct must be governed by standards which can be imputed only to the most cynical members of the public. Inasmuch as attorneys now commonly use disqualification motions for purely strategic purposes, such an extreme approach would often unfairly deny a litigant the counsel of his choosing. Indeed, the more frequently a litigant is delayed or otherwise disadvantaged by the unnecessary disqualification of his lawyer under the appearance of impropriety doctrine, the greater the likelihood of public suspicion of both the bar and the judiciary. . . . Consequently, while Canon 9 does imply that there need be no proof of actual wrongdoing, we conclude that there must be at least a reasonable possibility that some specifically identifiable impropriety did in fact occur." [537 F.2d 804, 813 (footnotes omitted).]

The District Court thought the instant case analogous to *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751 (2d Cir. 1975). There the Second Circuit affirmed the District Court's denial of Chrysler's motion to disqualify as attorney for plaintiff, Schreiber, an attorney formerly in a law firm representing Chrysler. The Second Circuit, relying on *Laskey Bros. of West Virginia, Inc. v. Warner Bros. Pictures*, 224 F.2d 824 (2d Cir. 1955) held that the inference or presumption that Schreiber had received confidential information from Chrysler during his former association was rebutted by Schreiber's testimony that he did not receive any such information.[3] *Silver*

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[3] The District Court in the instant case held the view that there is here, as in *Silver Plymouth, Inc. v. Chrysler*, supra, a rebuttable inference which has been rebutted. The Eighth Circuit held herein that absent an attorney-client relationship there is no presumption or inference of confidential communication.

Plymouth Chrysler, Inc. v. Chrysler Motors Corp., supra and *Laskey Bros. of West Virginia, Inc. v. Warner Bros. Pictures, Inc.*, supra are much more closely analogous to the instant case than are *Hull, NCK* or *Fund of Funds*, and are a further demonstration that there is no conflict between the views expressed by the Eighth Circuit herein and those held by the Second Circuit.

B. **The Trial Court Correctly Found That No Member of the Lashly Firm Received Any Confidential Information From Any of the Other Defendants in United States v. American Oil Co., et al. This Finding of Fact Is Not Clearly Erroneous.**

It is undisputed that there was no evidence that any member of the Lashly firm received any confidential information from any co-defendant in *United States v. American Oil Co., et al.* There was no evidence of any particular confidential communication claimed by defendants to have been received by any member of the Lashly firm. The Court ordered defendants to produce such evidence first *in camera* by filing all material thereon together with affidavits (Order, April 20, 1977) and then in open court. The record is completely bare of any inference or implication that any member of the Lashly firm in fact received any such communication.

Counsel for defendant Shell, on June 2, 1977, obtained from the Lashly firm's client, Kerr-McGee Oil Company, a copy of the bill to Kerr-McGee (Shell Ex. A, Pet. Append. p. 23a, Tr. 111) which contains among a great number of items, the phrase "review of debriefing statements as applied to Kerr-McGee and Mr. Jack H. Mitchell." Neither Mr. Lashly nor Mr. Rava had any recollection of any review of any debriefing statements in Mr. Coburn's office and denied any such review (Tr. 91, 122). The bill item makes no reference to which debriefing statements are referred to or when or where they were seen. Kerr-McGee

was represented by Lynn Adams, General Counsel for Kerr-McGee and by the Lashly firm. The Lashly firm was employed by Kerr-McGee in September 1965 after the indictment had been returned (Tr. 121). When questioned, Mr. Lashly testified that the bill item referred to debriefing statements of Kerr-McGee's employees (Tr. 123). Petitioners argue at page 5 of their petition that the bill has some significance. It has none at all. It does not even tend to show that any member of the Lashly firm received any confidence of defendant Shell or defendant Amoco in the prior proceedings.

Additionally Petitioners argue at pages 6 and 7 of their petition that generally described conversations among counsel for co-defendants are tantamount to disclosure of clients confidences. Both the District Court and the Eighth Circuit correctly held otherwise. The District Court afforded Shell and Amoco the opportunity to produce *in camera*, without disclosure to Weber's counsel, any alleged confidential information which they claim was disclosed to the Lashly firm. None was forthcoming. In this posture of the record and in view of Mr. Lashly and Mr. Rava's denials that any confidences were received, it is inappropriate for petitioners to attack the District Court's findings of fact which must stand unless they are "clearly erroneous." (*United States v. United States Gypsum Company*, 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948); Rule 52(a), Federal Rules of Civil Procedure). The District Court has discretionary responsibility for the supervision of the members of its Bar and the exercise of that discretion will be disturbed on appeal only where it has been abused. Courts of appeal have affirmed the exercise of such discretion both where the district court has ordered an attorney disqualified, *Allied Realty of St. Paul, Inc. v. Exchange National Bank of Chicago*, 408 F.2d 1099 (8th Cir. 1969); *Hull v. Celanese Corp.*, supra, and where the district court has declined to do so, *Akerly v. Red Barn System, Inc.*, 551 F.2d 539 (3d Cir. 1977).

C. **Petitioners' Circular Argument Concerning Claimed Confidences.**

Petitioners argue that the Eighth Circuit's decision herein threatens information claimed to have been exchanged in confidence between counsel for co-defendants in the 1965 case. Petitioners point to *In re Grand Jury Subpoena Duces Tecum*, 406 F.Supp. 381 (S.D.N.Y. 1975); *Hunydee v. United States*, 355 F.2d 183 (9th Cir. 1965); *Continental Oil Co. v. United States*, 330 F.2d 347 (9th Cir. 1964), as authorities for the proposition that one client's confidence communicated to counsel for a co-defendant is entitled to the protection of the attorney-client privilege. Each case gave protection to a specific communication and prohibited its disclosure either by way of discovery or as evidence at trial. The cases do not raise or deal with the issue of disqualification. Petitioners in effect argue here that there was a confidential communication because the relationship between counsel for co-defendants in the 1965 case was a confidential one and that the relationship was a confidential one because there were confidential communications. There is no authority for the proposition that the relationship between counsel for co-defendants is a confidential one, and the proof is that there were no communications of confidence to members of the Lashly firm. The Eighth Circuit quite correctly rejected petitioners' circular argument.

D. **Petitioners' Unfounded Innuendos.**

The petitioner oil companies point out at pages 7 and 8 of their petition that the original Complaint herein filed December 8, 1975 by Messrs. Edward D. Weakley and Michael J. Aubuchon on behalf of plaintiff Fred Weber, Inc. contained no conspiracy, price fixing or restraint of trade allegations and that such allegations were included in the Amended Complaint filed May 3, 1976 after Mr. Weakley joined the Lashly firm. The

case originally came to Mr. Weakley. He made an agreement in October 1975 to join the Lashly firm effective January 1, 1976. He became ill. Mr. Rava of the Lashly firm, who is claimed by petitioners to have somehow acquired some of their confidences in the earlier case, actually did considerable drafting on the original Complaint. (Weber's Verified Return to Motion to Disqualify filed February 28, 1977.) Petitioners suggest by innuendo that the chronology of the Complaint and the Amended Complaint is the basis for an inference that the conspiracy, price fixing and restraint of trade allegations in the Amended Complaint are the result of some Shell or Amoco confidence possessed by the Lashly firm. The suggestion is a *non sequitur* considering Mr. Rava's extensive participation in the drafting of the original Complaint. The Amended Complaint was filed only after the initial stages of discovery and the independent investigation conducted by Mr. Weakley and Mr. Rutherford of the Lashly firm in early 1976.

Petitioners suggest, again by innuendo only, that some significance is to be attached to Judge Regan's recusing himself. Judge Regan was convinced that Shell and Amoco were guilty of criminal conduct in 1965 and he felt that there might be some appearance of partiality on his part. The requirement of judicial impartiality has nothing to do with the qualification or disqualification of adversary counsel.

Petitioners suggest at pages 8, 9, 11 and 19 of their petition that the Lashly firm "switched sides". It did not. No member of the Lashly firm ever represented Shell or Amoco. No member of the Lashly firm was ever on their "side".

CONCLUSION

Shell and Amoco have the burden of proof on a motion to disqualify. *American Can Company v. Citrus Feed Company*, supra; "Representation of Interest Adverse to that of a Former

Client," 55 Boston University Law Review 61 (1975). There was no proof of an attorney-client relationship between any member of the Lashly firm and Shell or Amoco. There was no proof of the communication of any client's confidence to any member of the Lashly firm by any counsel for a co-defendant in *United States v. American Oil Co., et al.*, supra. There was in fact no attorney-client relationship. There was in fact no communication of a client's confidence.

Both the District Court and the Eighth Circuit correctly perceived the dual nature of the failure of proof and correctly denied the motion to disqualify. The petition for certiorari should be denied.

Respectfully submitted,

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